2001

Mule Hide Products v. Christine White : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MULE-HIDE PRODUCTS CO., INC., Appellate Court No. 20010008-CA
Plaintiff and Appellee,

vs.

Priority No. 15

CHRISTINE WHITE, dba ALLIED BUILDING COMPONENTS,
Defendants and Appellants.

BRIEF OF APPELLEE

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT, HONORABLE HOMER F. WILKINSON

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This matter was transferred to this Court by the Utah Supreme Court by Order dated February 28, 2001, and this Court has jurisdiction under U.C.A.78-2a-3(j), as amended.

APPELLEE'S STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

Issue no. 1: Whether Buyer has adequately marshaled the evidence on appeal.

Standard of review: To show that a factual finding is against the clear weight of the evidence, an appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even viewing it in the light most favorable to the court below. URAP 24(9); Oneida/ SLIC v. Oneida Cold Storage, 872 P.2d 1051, 236 Utah Adv. Rep. 24 (UT App. 1994)

Issue no. 2: Whether the evidence was sufficient to support the trial court's judgment that Appellant Christine White dba Allied Building Components ("Buyer") is liable to Appellee Mule-Hide Products Co., Inc. ("Seller") under her Continuing Guaranty agreement with Seller ("Guaranty") and her Credit Application and Agreement with Seller ("Agreement") for

unpaid invoices for roofing materials ordered in Buyer's name, sold, and delivered.

Standard of review: "...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses...It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum decision filed by the court..." URCvP 52(a); State v. Pena, 869 P.2d 932 (UT 1994).

Issue no. 3: Whether the trial court's conclusion that Ms. White should be personally liable is correct under the doctrine of equitable estoppel.

Standard of review: Application of particular facts to the legal standard of estoppel is a mixed question of law and fact. The trial court's legal conclusions are reviewed for correctness and its factual findings for clear error. Nunley v. Weststates Casing Servs, 1999 UT 100, 989 P.2d 1077 (UT 1999).

Issue no. 4: Whether the trial court's conclusion that Ms. White should be personally liable is correct by application of the doctrines of apparent agency and estoppel.

Standard of review: To the extent application of these doctrines is particularly fact dependent, Appellant submits that the standard of review

should combine review for correctness on the legal issues and review for clear errors on the factual issues clear error and allow appropriate discretion and leeway to the trial court in applying the legal principles to the facts. State v. Pena, 869 P.2d 932 (UT 1994). The trial court should be allowed broad discretion on the issue of estoppel. Nunley v. Weststates Casing Servs, 1999 UT para. 31 ; 989 P.2d 1077, 1087 (UT 1999).

Issue 5: Whether the trial court's restriction on the scope of cross examination was an abuse of discretion under URE 611(a) and (b).

Standard of review: The trial court has broad control over the mode and manner of the examination of witnesses which is reviewed for abuse of discretion. Russell v. Russell, 852 P.2d 997 (UT 1993).

Issue no. 6: Whether any error in the trial court's exclusion of claims and evidence pertaining to a separate warranty dispute between Seller and a third-party was harmless under URCvP 61.

Standard of review: An error is harmful only if the likelihood of a different outcome is high enough to undermine the appellate court's confidence in the result. Crookston v. Fire Ins. Exch., 817 P.2d 789 (UT 1991).

Issue no. 7: Whether Buyer should be required to pay Seller's costs on appeal under URAP 34(a) and Seller's attorney's fees as provided by contract.

SUPPLEMENT TO APPELLANT'S STATEMENT OF THE CASE

III. Supplemental Relevant Facts.[1]

1. Kimberly Hendricks testified at trial that since 1995 she has been president of Mule-Hide Products Co., Inc. ("Mule-Hide") which is a commercial roofing distributor which sells roofing products throughout the United States exclusively through its authorized distributors. (Trial T. 22-23, 30). Before then, she was controller and vice president responsible for the company's financial statements and for approving credit applications on the order of two or three per year. (Trial T. 23-24). She holds a degree in accounting and finance and is a CPA. She is also an attorney licensed in Wisconsin.(Hendricks, Trial T. 23)

2. Mule-Hide stock is owned 100 percent by its parent company ABC Supply Company which is a building materials distribution network. (Hendricks, Trial T. 23).

3. In 1993, Ms. Hendricks received a credit application to Mule-Hide from Ron Case Roofing doing business as Allied Building Components. (Hendricks, Trial T. 29-30, 31). She testified the application was rejected. (Hendricks, Trial T. 31-32) She explained the reasons. First, an important

business principle for Mule-Hide is not to authorize roofing contractors who use Mule-Hide products to become distributors. This would create a conflict of interest by giving a contractor-distributor an unfair price advantage in the market. (Hendricks, Trial T. 30). Second, Mule-Hide sells exclusively through distributors and has historically done so as standard practice. Mule-Hide's business would be destroyed if other distributors were to learn that Mule-Hide was selling directly to roofing contractors. (Hendricks, Trial T. 30). Third, because Mr. Case was not creditworthy. (Hendricks, Trial T. 30-31). In Ms. Hendrick's opinion, "...he did not have personal assets in his name. It appeared his personal assets were held elsewhere. (Hendricks, Trial T. 31).

4. In 1994, Mule Hide had approximately 15 separate accounts with its distributors. (Hendricks, Trial T. 23).

5. On or about July 5, 1994, Christine White as a proprietor dba Allied Building Components signed and submitted to Mule-Hide the subject Agreement and Guaranty. (White, Trial T. 126, Plaintiff's trial exhibits 1 and 2, Buyer's Addendum tabs 6 and 7). Ms. Hendricks personally had the authority to determine for Mule-Hide whether to accept this new account. (Hendricks, Trial T. 28). There were inadequate assets to justify authorizing credit and so a personal guarantee based on sufficient personal assets was required by Mule-

[1] Supplemental facts are needed to the extent that Buyer fails to marshal the evidence as discussed below.

Hide and this was specifically discussed between Ms. Hendricks and Ms. White during negotiations. (Hendricks, Trial T. 26-28, 32-33; White Trial T. 126)

6. As part of negotiations, Ms. Hendricks specifically discussed with Ms. White the need for a personal guarantee. (Hendricks, Trial T. 35). At this time, Ms. Hendricks understood Ron Case Roofing would be buying products from ABC Supply as its primary customer. (Hendricks, Trial T. 35-36). However, Ms. Hendricks was unaware that Ms. White was married to Ron Case. Ms. Hendricks (Hendricks, Trial T. 35). In fact, Ms. White had been married to Mr. Case for a long time and typically used her maiden name. (Buyer's counsel during opening remarks, Trial T. 10; White, Trial T. 124, 131)

7. The July 5, 1994 Credit Application and Agreement signed by Christine White shows Allied Building Components Supply Co. is a proprietorship of Ms. White's provides in part:

> "The Credit Application is executed by Buyer to induce Mule-Hide Products Co., Inc. ("MHPC") to extend credit to buyer. All purchases by Buyer hereunder are made pursuant to MHPC's Purchase Agreement, the Terms and Conditions of which have been read by Buyer and which are incorporated by reference herein.
>
> 1. Buyer shall pay each invoice in full in accordance with the terms of the Particular Purchase Agreement, invoice, or other shipping document, with or without Buyer's signature. In the event the Buyer fails to make payment when due, Buyer agrees to pay, in addition to the invoice amount, a monthly late payment charge of 1.5% of Buyer's outstanding balance...

Oneida/ SLIC v. Oneida Cold Storage, 236 Utah Adv. Rep. 24, 872 P.2d 1051, 1053-1054 (UT App. 1994)

2. Buyer agrees to pay all costs of collection by MHPC of any amounts due hereunder, including a reasonable attorney's fee...

6. Buyer agrees to provide prompt, written notice of any change in name, address, ownership, or form of business entity." (Plaintiff's trial exhibit 1, Distributor's Addendum tab 6).

8. The Continuing Guaranty signed by the Buyer provides in part:

> "3. Binding Effect. Revocation. This Guaranty is a continuing guaranty and shall remain in full force and shall be binding upon Guarantor and Guarantor's heirs, executors, administrators, and assigns notwithstanding the death of one or more of the undersigned, until the expiration of thirty (30) days after written notice by Certified or Registered Mail or revocation is received by MHPC at its office first written above and until any and all of the Indebtedness owed to MHPC and incurred prior to the expiration of the thirty (30) day period shall have been fully paid." (Plaintiff's trial exhibit 2, Buyer's Addendum tab 7).

9. Ms. White was unable to produce at trial evidence that she sent to Mule-Hide written notice of revocation of her personal guaranty by certified or registered mail. (White, Trial T. 138; Case, Trial T. 80)

10. On or about February 22, 1997 Christine White and Ron Case executed Articles of Organization of Ron Case Roofing Supply, L.L.C. and since then have been members of the L.L.C. (Defendant's trial exhibit 18, Buyer's addendum tab 17). Ron Case testified as to why the L.L.C. was formed:

> "A: Well, we purchased a new piece of property over on Redwood Road, and Chris had been wanting to get out of the distributing business, and so I told her that would be a good time to do it, when we purchased this property. We'd just close down Allied and Ron Case Roofing Supply would take over." (Case, Trial T. 61)

11. The evidence at trial failed to show that Ms. White properly notified Mule-Hide in writing of the change in her business form. The trial court found no evidence showing that the February 13, 1998 "Dear Supplier" form letter from Ron Case Roofing Supply, L.L.C. advising that Allied Building Components was being purchased by Ron Case Roofing Supply, L.L.C. was ever sent to Mule-Hide. (Defendant's trial exhibit 19; Rounds, Trial T. 102-103 Buyer's addendum tab 13, Court's ruling, T. 176).

12. The evidence at trial failed to show that Mule-Hide agreed to relieve Ms. White of her personal guaranty or to replace her guaranty with that of Ron Case. Mule-Hide's July 29, 1998 collection letter addressed to Allied Building Components attention Ron Case and other attempts to collect on the debt other than against Ms. White do not operate as a waiver otherwise prejudice Mule-Hide under the terms of the Agreement, paragraph 5. (Buyer's Addendum, tab 6).

13. Buyer's witness Dave Homerding testified he worked for Mule-Hide beginning in 1993 regional sales manager and was involuntarily terminated in August 1994. (Homerding, Trial T. 107, 109, 116). At the time of trial Mr. Homerding was employed as a regional sales manager with Stay Fast Roofing Products and had an ongoing business relationship with Ron Case. (Homerding, Trial T. 107, 117).

14. Mr. Homerding had dealings with ABC Supply at a time when he believed it was owned by Christine White, but did not normally deal with her on issues related to the company. He dealt with Ron Case. (Homerding, Trial T. 107-110, 117).

15. In 1994, Mr. Homerding's job duties at Mule-Hide did not include personally approving and setting up new accounts. (Homerding, Trial T. 118) He would however recommend applicants to Ms. Hendricks. (Homerding, Trial T. 118; Hendricks, Trial T. 28.)

16. Mr. Homerding understood that as early as 1993 Mule-Hide sold products to Ron Case or to an entity with which Mr. Case involved. (Homerding, Trial T. 109, 117) Mr. Homerding assumed that Ron Case had an existing authorized distributor account with Mule-Hide. (Homerding, Trial T. 110-111, 117-119) However, Mr. Homerding was unable to produce records showing that and does not know that Mr. Case was authorized to purchase product through the ordinary channels at Mule-Hide. (Homerding, Trial T. 118-119). As mentioned above, Ms. Hendricks testified that the prior application of Ron Case to become a distributor was denied. (Hendricks, Trial T. 147).

17. Mr. Homerding at trial did not specifically recall people at Ron Case Roofing Supply contacting him on the issue of erroneous billings to Allied Building Components which should have gone to Ron Case Roofing

Supply, or whether he passed any such information along to anybody else at Mule-Hide. (Homerding, Trial T. 112, 114).

18. A three page purchase order number 0004810 dated March 19, 1998 for the unpaid product at issue shows Allied Building Components ordered from Mule-Hide Products Co., Inc. materials totaling a net order amount of $35,932.00. The shipping directions were "Ship to: Allied Building Components Sup.; 4731 W. 3500 So.; P.O. Box 70271; SLC, UT 84170." The shipping address is the same address shown on the Credit Application and Continuing Guaranty executed by Ms. White. (Plaintiff's trial exhibit 5, Buyer's Addendum tab 11; Absence of dispute discussed in closing argument by Buyer's counsel, T. 154; Hendricks, Trial T. p.41).

19. Purchase orders are routinely processed at Mule-Hide by the customer service department and if there is an open account they are processed automatically. (Hendricks, Trial T. 40-41).

20. Ms. White denied knowing about or authorizing the subject purchase order which was faxed from Mule-Hide from the fax machine at the office of Ron Case. (White, Trial T. 131, 137; Case, Trial T. 77-78).

21. Mr. Case testified that Ron Case Roofing Supply, L.L.C. purchased the subject materials and explained the basis for his answer as follows: "A:

Well, Allied wasn't in business, so we had to purchase the material." (Case, Trial T. 73-74).

22. Mr. Case was unable to explain why the purchase order was in the name of Allied Building Components. (Case, Trial T. 78).

23. Mule-Hide in response to Allied Building Components Supply Co.'s purchase order 004810 sold and shipped to Allied materials with charges as shown on the following invoices:

a.	invoice 27509 dated 3/31/98 totaling	$25,758.25
b.	invoice 27542 dated 4/1/98 totaling	$310.00
c.	invoice 27560 dated 4/1/98 totaling	$615.32
d.	invoice 27615 dated 4/1/98 totaling	$2,235.50
c.	invoice 28098 dated 5/8/98 totaling	$6,799.29
	INVOICES TOTAL	**$35,718.36**

(Plaintiff's trial exhibit 3; summarized in Defendant's trial exhibit 12, Buyer's addendum tab 15).

24. When the invoices were not paid, Ms. Hendricks personally made twenty to thirty phone calls to Ms. White to obtain payment. Some of these phone calls were answered in the name of Allied Building Components. Ms. Hendricks personally spoke to Ms. White during some of these calls. (Hendricks, T. 43-44). The explanations about non-payment given by Ms.

White to Ms. Hendricks were that she did not have the money. Ms. Hendricks testified:

> "There was no—there was no issue of 'we didn't receive the material.' 'It was invoiced incorrectly.' 'I don't owe the money to begin with.' None of these issues were brought to my attention until litigation had started." (Hendricks, T. 43-44).

25. Ms. White denied under oath receiving any collection letters or calls from Mule-Hide or having any contact with Mule-Hide since early 1997. (White Trial T. 136).

26. The trial court stated its findings of fact and conclusions of law on the record and in open court at the close of the evidence. (Trial T. 176-181)

SUMMARY OF ARGUMENTS

First, Buyer fails to marshal the evidence in her challenges to key factual findings. To enable the Court of Appeals to determine whether the findings of fact are clearly erroneous, appellant is required to play devil's advocate setting forth in careful detail the evidence supporting the findings. The Court of Appeals should not consider the merits of Buyer's challenges to the findings of fact.

Second, the credible evidence was sufficient to support the trial court's conclusion. A purchase order regular on its face was submitted to Seller by fax transmission in the name of Buyer as an authorized distributor of Seller's products. Ms. White claimed that she had ceased business operations of her dba

and transferred the assets to a third-party L.L.C. of which she and her husband Ron Case were members. The L.L.C. was not an authorized distributor. She claimed that the order was placed without her knowledge or consent but in her dba name by the L.L.C. However, the Agreement required Ms. White promptly to notify Seller of any change in her business name, address, ownership or form of business entity which she failed to do. Further, her continuing personal guaranty had not been revoked by her in the manner required by contract before the transaction. The trial court found that Seller acted reasonably and without knowledge of the change in Ms. White's business. Further, the trial court found Ms. White had knowledge of the activities of the L.L.C. The trial court had evidence sufficient to support its conclusion that the order should be charged to the account of Ms. White's dba and that she should be personally liable under her continuing guaranty.

Third, the trial court's finding of liability against Ms. White is correct under the doctrine of equitable estoppel. Ms. White had a duty promptly to advise Mule-Hide of changes in her business name, operations, and ownership and if she wished to revoke her guaranty to do so in writing. She failed to do this and now claims that an entity which took over her dba should be charged with the debt. Mule-Hide reasonably relied on her silence in filling the purchase order submitted on the name of her account. Mule-Hide will be injured by

nonpayment of the invoices and the additional amounts for its attorney's fees and costs provided by contract if Ms. White is allowed to repudiate the purchase order.

Fourth, the trial court's finding of liability against Ms. White is correct on application of the doctrines of apparent agency and estoppel to deny agency. A principal is bound by the unauthorized acts of an agent clothed with apparent authority. The doctrine of apparent agency focuses on the acts of the principal from the perspective of a third party. If as Buyer claims, the Ron Case L.L.C. took over buyers operations without notice to Mule-Hide and sent the purchase order without Buyer's knowledge or consent the L.L.C. did so as the apparent agent of Buyer. The Buyer's conduct creating apparent authority includes her furnishing the L.L.C. with her account name and information for ordering from Mule-Hide, and her silence about the change in business operations when she had a contract duty to speak, and her failure to take prompt action to return or take other appropriate steps with respect to the goods which she said she never intended to order.

Fifth, the trial court's partial summary dismissing claims by a non-party relating to a warranty dispute with Mule-Hide where those claims are the subject of another lawsuit, and restricting accordingly the presentation of evidence concerning those claims are mattes well within the trial court's

discretion. In any event, it is highly unlikely this evidence would have made a difference in the bench trial, and any error is harmless.

ARGUMENT

POINT ONE: BUYER HAS FAILED TO MARSHAL THE EVIDENCE ANDTHE COURT OF APPEALS SHOULD NOT CONSIDER HER CHALLENGES TO THE TRIAL COURT'S FINDINGS OF FACT

The daunting task of marshalling the evidence on appeal was explained in Oneida/ SLIC v. Oneida Cold Storage, 236 Utah Adv. Rep. 24, 872 P.2d 1051, 1052-1053, (UT App. 1994):

> "Utah appellate courts do not take the trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. '[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshalling] duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very finding the appellant resists.' [citations omitted] Once appellants have established every pillar supporting their adversary's position, they then must 'ferret out a fatal flaw in the evidence' and show why those pillars fail to support the trial court's findings. [citation omitted] They must show the trial court's findings are 'so lacking in support as to be 'against the clear weight of the evidence,' thus making them ' clearly erroneous.' [citation omitted]'" (emphasis original).

The consequence to appellants who fail properly to martial the evidence when required is that the appellate court will not consider the merits of challenges to the findings and will accept them as valid. (id. at 1053). Here, Buyer has failed to marshal the evidence but has simply re-argued her case. The

Court of Appeals should therefore decline to consider the merits of any of her challenges to the findings of fact and summarily affirm the judgment.

POINT TWO: THE EVIDENCE SUFFICIENTLY SUPPORTS THE TRIAL COURT'S FACTUAL FINDINGS.

The standards of review for factual issues and legal issues was discussed in State v. Pena, 232 Utah Adv. Rep. 3 869 P.2d 932, (UT 1994):

"...At the most basic level, two different types of questions are presented to a trial court: questions of law and questions of fact. Factual questions are generally regarded as entailing the empirical, such as things, events, actions or conditions happening, existing, or taking place, as well as the subjective, such as state of mind. [citations omitted] Legal determinations, on the other hand, are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances. [citation omitted]...Findings of fact are reviewed by an appellate court under the clearly erroneous standard...appellate review of a trial court's determinations of the law is usually characterized by the term 'correctness.'" 872 P.2d at 935-936).

" In a bench trial, the court must set forth the reasons for its decision in enough detail for the reviewing court to determine whether they are clearly erroneous." Lysenko v. Sawaya, 973 P.2d 445, 448 (UT App. 1999). It is not necessary for the trial court to resolve all conflicting evidentiary issues. In re Estate of Grimm, 784 P.2d 1238, 1248 (UT App. 1989).

As suggested in its remarks from the bench, the trial court found from the evidence the following facts. Ms. White and Ron Case are husband and wife. (T. 175). Mr. Case wanted to obtain a distributor agreement with Mule-

Hide but could not, and so dealing together with his wife Ms. White he helped her set up as a distributor. (T. 175). Ms. White dba ABC Supply executed the Guaranty which provided for attorneys fees, she did not revoke it in writing by certified or registered mail as required, and Seller relied on the Gauranty. (T. 175-176). She obtained the necessary license for and operated the dba for a time and then ceased operations. (T. 175). Ms. White and her husband Mr. Case are principals of Ron Case Supply Co. (T. 177). Ron Case Supply Co. took over ABC Supply and any inventory it had. (T. 177). However, Mule-Hide was not notified. (T. 175-176) The purchase order faxed from the office of Ron Case contained the same name and address of Ms. White's dba account with Mule-Hide as appeared on her business license. (T. 177). The product ordered was shipped and used by Ron Case Supply Co. without notice or objection given to Mule-Hide. (T. 177) Ms. White knew what was taking place and did not notify Mule-Hide. (T. 178). ABC Supply located in Salt Lake City was not forthright with Mule-Hide located in Wisconsin and Mule-Hide is innocent of any wrongdoing. (T. 177-178).

From the evidence outlined above, the trial court had ample reason to discount the testimony of both Ms. White and Mr. Case as unreliable. The testimony was biased and self-serving, implausible, and overcome by the weight of other more credible evidence. Mr. Homerding's testimony was given little

weight, consistent with his status as disgruntled ex-employee of Mule-Hide who wants to do right by Ron Case with whom he has continuing business. Simply put, the trial court had ample evidence to reach its findings and attached little weight to Ms. White's evidence on the material matters.

POINT THREE: THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S JUDGMENT THAT MS. WHITE IS LIABLE UNDER HER PERSONAL GUARANTY.

"Guaranty" in its primary and ordinary sense means to become responsible for the fulfillment of an agreement by another, to secure and answer for the debt or default or the miscarriage of another. Mann v. Erie Mfg. *Co.,* 120 N.W.2d 711 (Wis. 1963). A guaranty is an undertaking or promise which is collateral to a primary or principal obligation that binds the guarantor's performance in the event of non-performance of the principal obligation. Commercial Credit Corp. v. Chisholm Bros. Farm Equipment, 525 P.2d 976, 978 (Idaho 1974) A contract of "continuing guaranty" contemplates a future course of dealing extending over an indefinite period of time. (id. at 978). A contract of guaranty may provide for greater liability than that of the original debtor, and a guarantor may be liable for his separate and independent promise particularly when the language of the guaranty covers all indebtedness of "any kind...in any manner, either primarily or secondary, absolutely or contingently,

directly or indirectly...". Overland Park Sav. & Loan v. Miller, 763 P.2d 1092, 1093, 1100 (Kan. 1988).

In Commercial Nat. Bank v. Keene, 561 So.2d 813 (La. App. 2 Cir. 1990) creditor bank sought to recover against a former partner under a continuing guaranty of debts of the partnership incurred 17 months after the partner withdrew from the partnership and sold his interest. The continuing guaranty guaranteed future debts of the partnership but did not provide for revocation. The partner sold his interest to his other partners and was released from all obligations and the others agreed to indemnify him. Thereafter, the partnership executed a promissory note which was not paid. The partner argued that the bank through its attorney had knowledge of his release by the other partners which constituted a written revocation of his guaranty. The court of appeals disagreed, and wrote: "A continuing guaranty is not revoked merely by notice to the creditor that a guarantor has sold his interest in a business entity to another who thereafter also signs the guaranty.[citations omitted]" (id. at 815) Absent a proper revocation, "The fact that he was not a partner when the debt was incurred is not material or controlling.[citations omitted]" (id. at 816)

The guarantor unsuccessfully asserted the defenses of estoppel or laches. "Those doctrines are applicable only where enforcement of the asserted right would work injustice after excessive and unreasonable delay and after

reasonable reliance by another on the inaction that results in harm." (id. at 816) The court of appeals found no unreasonable day or justifiable reliance or change in position and refused to apply the doctrines: "Whatley failed to revoke the continuing guaranty to almost 17 months before the partnership incurred the debt. His inaction and his attempted revocation after the debt was incurred and demanded do not avail him." (id. at 816)

The evidence here amply shows Ms. White did not revoke her personal guaranty. Her legal arguments that a personal guaranty may not be applied to the debts of another or to the debts of an entity with which the guarantor is no longer affiliated are incorrect and inconsistent with her express contract duties.

POINT FOUR: THE TRIAL COURT'S CONCLUSION THAT MS. WHITE SHOULD BE LIABLE IS CORRECT UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL AND WAS APPROPRIATELY REASONED AND ARTICULATED.

"The absence of written findings does not alter the duty of the [appellate court] to sustain the trial court's order if we can do so on any proper grounds. [footnote omitted]" Matter of Estate of Shepley, 645 P.2d 605 606-607, n.3 (UT 1982).

Equitable estoppel requires proof of three elements: "

> (1) a statement, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result

from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. [citations omitted]" CECO v. Concrete Specialists, Inc., 772 P.2d 967, 969-970 (UT1989)

Ms. White remained silent and failed to take prompt and appropriate action when she discontinued the operations of ABC Supply, when those operations were taken over by Ron Case Roofing Supply of which she was a principal which was not a qualified Mule-Hide distributor and could not be, when a purchase order went out in the name of her account from Ron Case Roofing Supply of which she was a principal, and when Mule-Hide product arrived in Salt Lake which she now claims she did not order. Mule-Hide acted reasonably and without fault in reliance on her silence and inaction and will be injured if she is permitted to assert this claim.

POINT FOUR: THE TRIAL COURT'S CONCLUSION THAT MS. WHITE SHOULD BE LIABLE IS CORRECT UNDER THE DOCTRINE OF APPARENT AGENCY AND ESTOPPEL TO DENY AGENCY.

An agency relationship may exist without an express agreement under the doctrine of apparent agency even where the acts of the agent are unauthorized and adverse:

"It is a general principle of the law of agency, running through all contracts made by agents with third parties, that the principals are bound by the acts of their agents which fall within the apparent scope of the authority of the agents, and that the principals will not be permitted to deny the authority of their agents against innocent third parties who have dealt with those agents in

good faith. [citation omitted]"Horrocks v. Westfalia Systemat, 892 P.2d 14, 15-16 (UT App. 1995)

A principal who negligently or intentionally causes a third party to act on an agent's apparent authority will be estopped to deny that authority if the third party has detrimentally relied and it would be unjust to permit denial of the authority, Kuehn v Kuehn, 642 P.2d 524, 526 (Colo. App. 1981).

POINT FIVE: NO ERROR WAS COMMITTED BY THE TRIAL COURT IN LIMITING CLAIMS AND RESTRICTING EVIDENCE AND EXAMINATION OF WITNESSES. ALTERNATIVELY, ANY ERROR WAS HARMLESS.

The trial judge here, both at the time of summary judgment and trial, considered a separate warranty dispute in a separate lawsuit between a Ron Case entity and Mule-Hide as not sufficiently related to the case at hand to justify treating the two together. The discretion of the trial judge to separate claims in this manner, and to restrict evidence balancing probative value against waste and other factors, and to restrict the examination of witnesses accordingly is broad and was not abused here. Further, given the core evidence not subject to great dispute, any error is harmless.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mule-Hide submits that no substantial error or other reason warrants disturbing the trial court's judgment which should be affirmed. The contract between the parties provides for attorney's fees to Mule-

Hide and the trial court awarded fees on that basis. Mule-Hide respectfully requests the appellate court to award it attorneys fees on appeal together with costs.

Dated this 13th day of June, 2001.

DUNN & DUNN, P.C.

TIM DALTON DUNN
CLIFFORD C. ROSS
Attorneys for Appellee

CERTIFICATE OF SERVICE

I certify that on the 13th day of June, 2001 true and correct copies of the foregoing were served by hand delivery on Appellant's counsel, John D. Morris; 600 Gateway Tower East; 10 East South Temple Street; Salt Lake City, Utah 84133.